Supreme Court, U. S.
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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1980

NEWMAN MEMORIAL HOSPITAL, INC., NEWMAN MEDICAL CENTER, INC., JOSEPH J. SMITH, M.D., and JACK T. DANCER, M.D.,
Petitioners,

VERSUS

DONNA BETH HACKNEY, Successor Administratrix of the Estate of Byrdie E. Blasdel, Deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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August, 1980

QUESTIONS PRESENTED FOR REVIEW

1. Whether the prohibition against manufactured diversity jurisdiction found in 28 U.S.C. §1359 is applicable only to "straw parties" who have no substantial beneficial interest in the outcome of the litigation?

2. Whether the prohibition against manufactured diversity jurisdiction found in 28 U.S.C. §1359 is applicable only where the artificial creation of such jurisdiction is the *sole* reason underlying the appointment of a non-resident representative as plaintiff?

3. Whether the trial court properly dismissed respondent's action pursuant to 28 U.S.C. §1359?

PARTIES

The parties in the Court of Appeals were as follows:

Plaintiff-Appellant:	Donna Beth Hackney, successor administratrix to the estate of Byrdie E. Blasdel, deceased.
Defendants-Appellees:	Newman Memorial Hospital, Inc., an Oklahoma corporation, a/k/a Newman Memorial Hospital; Newman Medical Center, Inc., a professional corporation; Joseph J. Smith, M.D.; and Jack T. Dancer, M.D.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES	i
CITATION TO OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED	2
STATEMENT OF CASE	3
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	21
APPENDIX A — Opinion of the Tenth Circuit Court of Appeals, reversing the judgment of the District Court for the Western District of Oklahoma, with concurring Opinion (May 16, 1980)	A-1
APPENDIX B — Order of the United States District Court for the Western District of Oklahoma sustaining petitioner's Motion to Dismiss (October 4, 1978)	B-1

TABLE OF AUTHORITIES

Cases PAGE

Bass v. Texas Power & Light Co., 434 F.2d 1096 (5th Cir. 1970) 16

Chicot County Drainage Dist. v. Baxter, 308 U.S. 371 (1940) 6

Duffy v. Currier, 291 F.2d 810 (Minn. 1968) 16

Farrell v. Ducharme, 310 F.Supp. 254 (D. Vt. 1970) 16

Ferrara v. Philadelphia Laboratores, 272 F.Supp. 1000 (D. Vt. 1967), aff'd, 393 F.2d 934 (2d Cir. 1968) 16

Gilchrist v. Strong, 299 F.Supp. 804 (W.D. Okl. 1969) .. 6, 17

Groh v. Brooks, 421 F.2d 589 (3rd Cir. 1970) 18

Kramer v. Caribbean Mills, Inc., 394 U.S. 823 (1969) .. 18

McSparran v. Weist, 402 F.2d 867 (3rd Cir. 1968) 16

Richard v. Dervarics, 302 F.Supp. 709 (M.D. Pa. 1969) 15

Silvious v. Helmick, 291 F.Supp. 716 (N.D. W.Va. 1968) 16

Stover v. Benscoter, 462 F.Supp. 27 (E.D. Pa. 1978) 15

Trager v. New Rochelle Hospital Medical Center, 453 F.Supp. 516 (S.D. N.Y. 1978) 15

Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971) 6

White v. Lee Marine Corp., 434 F.2d 1096 (5th Cir. 1970) 16

Statutes

28 U.S.C. §1254(1) 2

28 U.S.C. §2101(c) 2

28 U.S.C. §1332 ..... 2, 5, 12

28 U.S.C. §1359 ..... 2, 6, 7, 8, 10, 11, 12, 14, 15, 16, 19

Rules

Rule 52(a), F.R.C.P. 13, 20

AUTHORITIES CONTINUED PAGE

Miscellaneous

Bratton, Diversity Jurisdiction — An Idea Whose Time Has Passed, 51 Ind. L.Rev. 347 (1976) 7

Phillips, The Expansion of Federal Jurisdiction and The Crisis In the Courts, 31 Vand. L.Rev. 17 (1978).. 7

Rowe, Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms, 92 Harv. L.Rev. 963 (1979) 7

Rowe, Abolishing Diversity Jurisdiction: The Silver Lining, 66 A.B.A.J. 177 (Feb. 1980) 7

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NEWMAN MEMORIAL HOSPITAL, INC., NEWMAN MEDICAL CENTER, INC., JOSEPH J. SMITH, M.D., and JACK T. DANCER, M.D.,
Petitioners,

VERSUS

DONNA BETH HACKNEY, Successor Administratrix of the Estate of Byrdie E. Blasdel, Deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on May 16, 1980.

CITATION TO OPINIONS BELOW

The opinion of the United States District Court for the Western District of Oklahoma sustaining petitioners' motion to dismiss is printed in Appendix B hereto and is not reported. The opinion of the Tenth Circuit Court of Appeals, which reversed the judgment of the District Court for the Western District of Oklahoma, is printed in Appendix A hereto. It has not yet been reported in the official reporter.

JURISDICTION

The judgment of the Court of Appeals, printed in Appendix A hereto, was entered on May 16, 1980.

The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The statutes here involved are Title 28 U.S.C. §§ 1332 and 1359, which provide in pertinent part as follows:

"Section 1332 — *Diversity of citizenship; Amount in controversy; Costs.*

(a) The district court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and is between —

(1) Citizens of different states:

(2) Citizens of a state, and foreign states or citizens who are subjects thereof; and

(3) Citizens of different states and which foreign states or citizens or subjects thereof are additional parties.

* * * *

Section 1359 — *Parties collusively joined or made.*

A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

STATEMENT OF CASE

Byrdie Blasdel passed away November 12, 1975, leaving as survivors her disabled husband and two daughters, Brenda Rea and Donna Hackney. Daughter Rea was appointed administratrix of Mrs. Blasdel's estate in November, 1975. Since the decedent's husband was not felt to be healthy enough to administer the estate and the other daughter, Donna Hackney, lived in Colorado, it was felt that Rea, an Oklahoma resident, could best administer the estate. Mrs. Rea contemplated litigation a couple of days after her mother's death and met with her present attorney in December, 1975.

A petition was prepared for litigation in Oklahoma State District Court for Oklahoma County with Mrs. Rea as plaintiff. However, this suit did not progress because she was unable to "catch" any defendant in Oklahoma County for the service of process.

By the end of 1976, Rea's duties as administratrix were completed with the exception of this litigation. In June, 1977, Mrs. Rea's sister, Mrs. Hackney, was substituted as administratrix. Prior to the substitution, the sisters agreed that they wanted the suit filed in Oklahoma County which is distant from the county of defendants' residence where the alleged negligent conduct occurred. Plaintiff's present attorney was secured solely for this litigation and it was he, not the attorney who represented the estate in the probate proceedings, who prepared the administratrix substitution papers. Since substitution, all Mrs. Hackney has done is change the name on her mother's bank account. She and her attorney discussed the fact that it would be

better if the suit were filed in Oklahoma County, and when she became administratrix she knew that it could then be filed in United States District Court in Oklahoma County. In fact, her attorney had told her that he would like for her to be appointed administratrix so that the case could be filed in Federal Court in Oklahoma County.

During the second or third week of August, 1977, Mrs. Hackney's husband received notice that he was being transferred to Oklahoma from Colorado. Mrs. Hackney called her attorney and told him she was moving to Oklahoma. On August 24, 1977, the Hackneys came to Oklahoma for five or six days to purchase a home and on the date suit was filed in Federal Court, August 29, 1977, they were either in Oklahoma or on their return trip to Colorado. They had signed the contract to purchase a home in Oklahoma during this trip. On September 9, 1977, the Hackneys completed their move to Oklahoma and have resided here ever since.

Mrs. Rea testified at the evidentiary hearing in District Court that she resigned because of her health. The court, however, found that the primary purpose of the substitution was to invoke federal jurisdiction and that:

> "... This case could have proceeded without any difficulty with Rea as administratrix notwithstanding her pregnant condition which was of limited duration and the state of her health. The evidence revealed discussions between the parties and attorneys regarding the successor Colorado administratrix as a means of filing the case in federal court. The attorneys in this case rather than the probate attorneys arranged for the resignation of Rea and the appointment of plaintiff.

> "Therefore, as this case is essentially a local controversy between Oklahoma citizens and there is no possibility of discrimination against an out of state party as plaintiff is now an Oklahoma resident and as plaintiff was appointed successor administratrix for the primary purpose of invoking federal jurisdiction, the court finds and concludes pursuant to 28 U.S.C. §1359 that it lacks subject matter jurisdiction of this action. (Citations omitted)"

Respondent appealed the order of the District Court sustaining petitioners' motions to dismiss and on May 16, 1980, the Tenth Circuit Court of Appeals reversed holding that the purpose of or motive behind the substituted appointment is not determinative in this case and that:

> ". . . The better view is to make immune from challenge [under 28 U.S.C. §1359] for diversity purposes, an appointment of a fiduciary who has a substantial beneficial interest in the litigation being conducted."

Respondent is contending diversity jurisdiction lies in Federal Court under 28 U.S.C. §1332. Petitioners deny that the federal system has proper subject matter jurisdiction and contend that diversity was improperly or collusively created to invoke the jurisdiction of a federal district court, all of which is prohibited by 28 U.S.C. §1359.

REASONS FOR GRANTING THE WRIT

This petition concerns the abuse of federal diversity jurisdiction by the artificial creation of such jurisdiction through the appointment of a non-resident administrator or guardian. A prohibition against such "manufactured diversity jurisdiction" is found in Title 28 U.S.C. §1359, but that statutory provision has become the subject of conflicting and contradictory interpretations by various circuit courts of appeal, all of which has rendered its enforcement exceedingly difficult and inconsistent.

Since we are here dealing with questions of federal jurisdiction, it must first be noted that federal courts are tribunals of limited jurisdiction and the statutes conferring such jurisdiction in derogation of the power of the state courts should be strictly construed. *Victory Carriers, Inc.* v. *Law,* 404 U.S. 202 (1971), *Chicot County Drainage Dist.* v. *Baxter,* 308 U.S. 371 (1940) and *Gilchrist* v. *Strong,* 299 F.Supp. 804 (W.D. Okl., 1969). See also Wright, Miller & Cooper, *Federal Practice and Procedure,* §3522. The narrow and inconsistent interpretations of 28 U.S.C. §1359, however, have had the effect of expanding the jurisdiction of the federal courts so as to include even those actions where such jurisdiction has been artifically created and would not otherwise exist. This result is in direct conflict with the intent and purpose of the statutory provisions conferring federal jurisdiction. As has been aptly noted by the American Law Institute:

> "There is no proper place in the federal courts for cases in which diversity has thus been deliberately created in order to obtain a federal forum for what would otherwise be a purely local lawsuit between co-

citizens." See American Law Institute, *Study of the Division of Jurisdiction Between Federal and State Courts* (Adopted May 18, 1965, and May 21, 22, 1968) at 118.

Manufactured diversity jurisdiction has become one of the most serious abuses of federal jurisdiction and has contributed substantially to the present crisis of our federal courts and the resulting call by legal scholars and lawmakers for the abolishment of federal diversity jurisdiction. See, e.g., Bratton, *Diversity Jurisdiction—An Idea Whose Time Has Passed,* 51 Indiana Law Review 347 (1976); Phillips, *The Expansion of Federal Jurisdiction and The Crisis In the Courts,* 31 *Vanderbilt Law Review* 17 (1978); *Rowe, Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms,* 92 Harvard Law Review 963 (1979) and Rowe, *Abolishing Diversity Jurisdiction: The Silver Lining,* 66 American Bar Association Journal 177 (Feb. 1980). Petitioners therefore submit that manufactured diversity jurisdiction has become a question of federal law of considerable urgency which should be settled by this Court.

The questions presented by this petition concern two aspects of the rule against manufactured diversity jurisdiction and its application to the circumstances of the present case. First, petitioners question the ruling of the Tenth Circuit Court of Appeals that respondent is immune to the provisions of Title 28 U.S.C. §1359 because the respondent has a "substantial beneficial interest" in the outcome of the litigation here in question. Respondent, although a daughter of the decedent for whose death this action is brought, was found by the trial court to have been

appointed administratrix for the primary or dominant purpose of invoking federal diversity jurisdiction. The Court of Appeals did not question the trial court's findings of fact, but held that since respondent is a beneficiary of decedent's estate, the provisions of 28 U.S.C. §1359 were not applicable — notwithstanding the fact that §1359 states that its mandate extends to "any" party. Secondly, petitioners urge that this Court consider whether the prohibition against manufactured diversity jurisdiction found in 28 U.S.C. §1359 is applicable only where the artificial creation of such jurisdiction is the *sole* reason underlying a non-resident's appointment, or whether it is sufficient that such be the primary or dominant purpose underlying the appointment. This question of the applicable test of manufactured diversity jurisdiction was not reached by the Court of Appeals since it held that respondent was not subject to the provisions of 28 U.S.C. §1359. Lastly, petitioners urge that the Court review and affirm the trial court's dismissal of respondent's action pursuant to 28 U.S.C. §1359.

The trial court's finding that respondent's appointment as administratrix was improperly and collusively made so as to invoke the diversity jurisdiction of the federal court was amply supported by evidence of the following facts:

1. The decedent, Byrdie Blasdel, was a life-long resident and citizen of Oklahoma.
2. The decedent's surviving spouse is also a life-long resident and citizen of Oklahoma.
3. The younger of decedent's two children (Brenda Rea) has at all times been a resident and citizen of Oklahoma.

4. The decedent's other daughter (respondent Donna Beth Hackney) grew up in Oklahoma and is today a resident and citizen of Oklahoma.

5. Decedent's death occurred in Oklahoma.

6. Administration proceedings for decedent's estate were instituted in Woodward County, State of Oklahoma.

7. Decedent's younger daughter, Brenda Rea (an Oklahoma citizen) was appointed to administer said estate and fulfilled all duties of administration except for the filing of this suit.

8. Shortly after decedent's death, decedent's family decided to pursue a malpractice action against certain defendants, all of whom are Oklahoma citizens.

9. The alleged acts upon which decedent's family bases their cause of action all occurred in Oklahoma.

10. Decedent's family decided to pursue this malpractice action, and upon the advice of counsel, determined that it should be filed in Oklahoma County.

11. The original administratrix attempted to sue petitioners in State District Court in Oklahoma County, but was unable to obtain service upon petitioners in Oklahoma County.

12. When the attempt to file suit in State District Court in Oklahoma County failed, decedent's family and their attorneys decided to pursue the action in the United States District Court for the Western District of Oklahoma sitting in Oklahoma City.

13. Respondent (decedent's older daughter who was then residing in Colorado) was advised by the family's litigation attorney that wanted her to be

appointed successor administratrix of her mother's estate in order that the action could be filed in Federal Court.

14. The instruments affecting the change of administratrix were all prepared by the attorney handling this litigation, as opposed to the attorney handling the estate.
15. All beneficiaries of decedent's estate are Oklahoma citizens.
16. There are no out-of-state litigants to complain of prejudice in the Oklahoma courts.

From this evidence, the trial court concluded that "The totality of the circumstances surrounding Rea's resignation and plaintiff's appointment established that the primary or dominant purpose of the appointment of the plaintiff as successor administratrix was to invoke federal jurisdiction." The trial court went on to observe that the case was essentially a local controversy between Oklahoma citizens with no possibility of discrimination against an out-of-state party since respondent is now an Oklahoma resident. For the reasons set forth, the trial court concluded that it lacked subject matter jurisdiction of this action pursuant to 28 U.S.C. §1359.

I

The Tenth Circuit Court of Appeals found that the facts of the present case are distinguishable because the respondent is not merely a nominal or "straw" party as has often been true in cases dealing with manufactured diversity jurisdiction. The Court of Appeals held:

> "A rule permitting challenge of the appointment as fiduciary of a nonresident family member who has a

> beneficial interest in the recovery would provide an opportunity for delay tactics by defendants and force trial courts to hold hearings upon subjective motivations that would be time consuming and extremely difficult to resolve. We think the better view is to make immune from challenge, for diversity purposes, an appointment of a fiduciary who has a substantial beneficial interest in the litigation being conducted." Slip Opinion at 7; Appendix A hereto.

Petitioners submit that the Court of Appeals has created an illogical and unlawful exemption to the provisions of Title 28 U.S.C. §1359. The Tenth Circuit Court has decreed that the federal courts must accept jurisdiction even in the most extreme, aggravated and clear-cut instances of manufactured diversity jurisdiction, so long as the nonresident plaintiff has a substantial beneficial interest in the outcome. Petitioners recognize that a plaintiff's relationship to the estate or ward that he represents and his beneficial interest in the outcome of the litigation are factors which should be considered by the court in determining whether the plaintiff's appointment was "collusive or improper" for the purpose of invoking federal diversity jurisdiction. Petitioners cannot agree, however, with the Tenth Circuit Court's ruling that these two factors, in and of themselves, should be decisive as to the question of manufactured diversity jurisdiction; rather, petitioners submit that the prohibition against the artificial creation of diversity jurisdiction should be equally applicable to all litigants.

The only rationale given by the Circuit Court for its holding is that such an immunity would relieve trial courts of the difficulty of assessing the motives underlying a plaintiff's appointment, and thereby avoid possible needless de-

lay. In doing so, however, the court has placed upon the trial court the substitute burden of determining what constitutes a "substantial beneficial interest" on the part of any given plaintiff, so as to render that plaintiff immune to the prohibition against manufactured diversity jurisdiction. By what standard does the trial court measure a plaintiff's beneficial interest in order to determine that it is "substantial"? Must the representative plaintiff's interest be direct and immediate, or can it be distant and contingent? Petitioners submit that these questions are no more easily answered than the question of the motives underlying plaintiff's appointment.

We now live in an age of the extended family — in fact, it is the rare family today that does not extend across several state boundaries. The Circuit Court's opinion has now made it possible for virtually every death action to be filed in Federal Court by the simple act of having the most immediate non-resident relative appointed administrator of the decedent's estate. As is true in the present case, such death actions are often local controversies with no bona fide basis of Federal jurisdiction. However, they easily become transformed into Federal diversity actions by the simple act of appointment of a non-resident administrator. This "Federal forum shopping" was certainly not the intent of Title 28 U.S.C. §1332 and is expressly forbidden by 28 U.S.C. §1359.

The potential for such abuse of the Federal Courts' jurisdiction is illustrated by the facts of the present case. Here, one of the decedent's two daughters was appointed administratrix of her mother's estate. Shortly thereafter, she and the other family members decided to file a mal-

practice action against the doctors and hospital which had treated the decedent during her last illness. These potential defendants were all located in an outlying rural county, and the administrator and family members decided (in consultation with their litigation attorney) that it would be preferable to file the suit in metropolitan Oklahoma County. Under Oklahoma venue laws such an action could only be filed in Oklahoma County by obtaining service on one of the defendants there. Accordingly, the family's litigation attorney prepared suit papers for filing in Oklahoma County with the original administratrix as plaintiff. The attorney attempted for some six months to "catch" one of the defendant physicians in Oklahoma County but was unable to do so. He thereupon advised the family that respondent (the decedent's other daughter and a resident of Colorado), should be substituted as administratrix in order that suit could be filed in Federal Court in Oklahoma City. The family's litigation attorney was able to arrange her appointment as successor administratrix and then file suit in her name in the United States District Court for the Western District of Oklahoma on the eve of the non-resident daughter's move back to Oklahoma.

In short, the evidence revealed the clear intent of the parties to substitute administratrices in order to file respondent's action in Federal Court. This was the trial court's finding of fact, a finding which should not be disturbed unless clearly erroneous. See Rule 52(a), F.R.C.P. Nevertheless, the Court of Appeals has set aside the trial court's determination and permitted this action to proceed in Federal District Court for the sole reason that the respondent was not a "straw party."

Petitioners submit that this distinction is unwarranted for the reason that respondent's beneficial interest does not render the jurisdiction here created any less artificial or manufactured. Title 28 U.S.C. §1359 prohibits the "improper or collusive" joinder of a party, and the joinder of respondent as successor administratrix in the present case was certainly no less improper or collusive simply because she had a beneficial interest in the outcome of the litigation. Title 28 U.S.C. §1359 certainly does not limit its prohibition against manufactured diversity jurisdiction to representatives who have no interest in the litigation. Nevertheless, the Court of Appeals' decision would have the effect of writing such an exclusion into the statutory language of 28 U.S.C. §1359.

The Court of Appeals placed considerable emphasis upon the fact that respondent could have been appointed administratrix from the outset, rather than being substituted as successor administratrix. However, the significance of this distinction is merely that the appointment of respondent in the original instance would not have been as glaringly and conspiciously collusive as it was in the present case. In either event, the determination should be reserved to the finder of fact as to whether an appointment is bona fide or is merely a vehicle for creating artificial diversity jurisdiction. Clearly, a finding of manufactured diversity jurisdiction would be more difficult in instances where it was less conspicuous than in the present case, but a trial court should nevertheless have the right and the obligation to prevent abuse of its own jurisdiction.

Furthermore, petitioners would point out that there is certainly no agreement among the various circuits as to

the significance of a non-resident plaintiff's relationship to a decedent or his interest in the litigation. In *Trager* v. *New Rochelle Hospital Medical Center,* 453 F.Supp. 516 (S.D.N.Y. 1978), a similar situation occurred with a husband resigning as executor in favor of the appointment of the decedent's non-resident brother. The court held that the husband's claim that he was too emotionally upset to administer his wife's estate failed to rebut the presumption against diversity jurisdiction and was not sufficient justification for renunciation of his position as executor. Similarly, in *Richard* v. *Dervarics,* 302 F.Supp. 709 (M.D. Pa. 1969), a non-resident aunt was appointed guardian in order that an action could be filed in Federal Court. Nevertheless, the court concluded that the non-resident aunt's relationship to the minor plaintiffs did not make her appointment as guardian any less artificial. See also *Stover* v. *Benscoter,* 462 F.Supp. 27 (E.D. Pa. 1978), wherein a non-resident sister and beneficiary of the decedent's estate was appointed for the purposes of filing a federal diversity action. The court there rejected the sister's attempt to manufacture diversity jurisdiction and specifically noted at page 28:

> "The fact that the sister might share in the distribution of any award in a death action under New Jersey law can be handled at least as easily in a Pennsylvania state court as it could be in a federal court."

For the above and foregoing reasons, petitioners respectfully urge that this Court should review and set aside the holding of the Court of Appeals creating an exemption from the provisions of 28 U.S.C. §1359 for individuals having a beneficial interest in litigation.

II

Petitioners also urge that this Court resolve the controversy and dispute among the circuits as to the proper standard for judging the motive or intent necessary for finding an appointment to be "improper or collusive" within the meaning of 28 U.S.C. §1359.

It is generally recognized that the Third Circuit's opinion in *McSparran* v. *Weist*, 402 F.2d 867 (3rd Cir. 1968), is the foundation for most of the recent cases regarding manufactured diversity jurisdiction. In *McSparran*, it was conceded that the out-of-state administrator in that case was appointed for the sole purpose of invoking federal jurisdiction. Consequently, *McSparran* has often been cited for the proposition that manufactured diversity jurisdiction is prohibited by 28 U.S.C. §1359 only where the creation of diversity jurisdiction is the *sole* purpose of the appointment of a non-resident administrator. See *White* v. *Lee Marine Corp.*, 434 F.2d 1096 (5th Cir. 1970); *Bass* v. *Texas Power & Light Co.*, 432 F.2d 763 (5th Cir. 1970); *Silvious* v. *Helmick*, 291 F.Supp. 716 (N.D. W.Va. 1968); *Duffy* v. *Currier*, 291 F.2d 810 (Minn. 1968); and *Farrell* v. *Ducharme*, 310 F. Supp. 254 (D. Vt. 1970).

At approximately the same time, the Second Circuit adopted a much broader approach in *Ferrara* v. *Philadelphia Laboratories*, 272 F.Supp. 1000 (D. Vt. 1967), *aff'd* on opinion below, 393 F.2d 934 (2d Cir. 1968). In *Ferrara*, the Court held at 1007:

> "The best that can be attained under the present state of the law is an empirical formula which calls for judicial inquiry into all the circumstances attend-

> ing the transfer whereby the plaintiff acquired his interest in the suit, and for a decision on the aggregate effect of those circumstances in the light of prior decisions and the policies underlying the statute."

The apparent divergent views of *McSparran* and *Ferrara* were the subject of a well reasoned analysis in *Gilchrist* v. *Strong*, 299 F.Supp. 804 (W.D. Okl. 1969), by the Honorable Fred Daugherty, the trial judge in the present case. Judge Daugherty there noted that the positions taken by the *McSparran* and *Ferrara* courts were essentially the same, notwithstanding the "sole purpose" language found in *McSparran*:

> "In *McSparran* it was conceded that the sole purpose of the appointment of the out-of-state administrator was to invoke federal jurisdiction, whereas, in *Ferrara* this was only one of several factors involved in the appointment. Nevertheless, the position of the *McSparran* and *Ferrara* courts is the same, as it was said in *McSparran*:
>
> > 'Whether in an individual case diversity jurisdiction is "manufactured" is, of course, a question of fact. Here "manufactured" diversity is conceded, but in other cases where it is not conceded it will be for the district court to make the determination.' 402 F.2d 867 at 876.
>
> Two considerations impel the court to favor and adopt the positions taken by the courts in the *McSparran* and *Ferrara* cases. First, federal courts are courts of limited jurisdiction, and the statutes conferring such jurisdiction in derogation of the power of the state court should be strictly construed. Second, as it is the policy of the diversity statute to provide the out-of-state litigant with a forum free from local prejudice, the effectu-

ation of that policy should be a paramount consideration in any decision supporting federal jurisdiction." 299 F.Supp. at 806-807.

Still another test emerged with the Third Circuit's opinion in 1970 in *Groh* v. *Brooks*, 421 F.2d 589 (3rd Cir. 1970). There, the court set forth a number of factors to be considered in passing upon the question of manufactured diversity jurisdiction:

> "In determining whether or not diversity has been artificially created, the district court may consider, *inter alia*, such factors as the identity of the representative and his relationship to the party represented; the scope of the representative's powers and duties; any special capacity or experience which the representative may possess with respect to the purpose of his appointment; whether there exists a nondiverse party, such as a parent in a suit for injuries to a child, who might more normally be expected to represent the interest involved; whether those seeking the appointment of the representative express any particular reasons for selecting an out-of-state person; and whether apart from the appointment of an out-of-state representative, the suit is one wholly local in nature." 421 F.2d at 595.

Despite the differing tests and standards suggested for determining whether an appointment was "improper or collusive" in any given case, the question of a proper test has never been addressed by this Court. A somewhat analogous problem of creation of diversity jurisdiction by assignment was considered in *Kramer* v. *Caribbean Mills, Inc.*, 394 U.S. 823 (169), but that opinion specifically avoided the questions here presented. See Note 9 appearing at 394

U.S. 828. Petitioners submit the uncertainty which prevails as to proper guidelines for application of the "improper and collusive" standard of 28 U.S.C. §1359 has not only resulted in divergent and conflicting decisions by various federal courts, but has also hampered the attempts of federal trial judges to police their own jurisdictional powers through a uniform enforcement of 28 U.S.C. §1359. Accordingly, petitioners urge that the question here presented represents an important question of federal law which has not been, but should be, settled by this Court.

III

Lastly, petitioners ask that this Court review and affirm the dismissal by the trial court of respondent's action. The arguments set forth above address the questions of (1) the trial court's finding of manufactured diversity jurisdiction despite respondent's beneficial interest in the litigation, and (2) the trial court's utilization of the "primary or dominant purpose" test in determining the motives underlying the respondent's appointment as successor administratrix.

With respect to this last issue, petitioners would further point out that the trial court's analysis actually satisfied both the "primary or dominant purpose" test and the "sole purpose" test. The only other motive suggested by respondent for her appointment as successor administratrix was the alleged health problems encountered by her predecessor, the original administratrix. The trial court, however, made a finding of fact which specifically rejected the respondent's contention that her predecessor's health necessitated the appointment of a successor administratrix. The court stated at page 5:

"Rea [the original administratrix] further testified that she resigned as administratrix solely because of her health. Likewise, plaintiff testified that she took the position of successor administratrix because of her sister's health. However, the evidence indicates that the majority of the duties of administration were carried out by Rea while she was administratrix and that the only thing plaintiff has done in connection with her mother's estate is prosecute this lawsuit. Further, the totality of the circumstances surrounding Rea's resignation and plaintiff's appointment established that the primary or dominant purpose of the appointment of plaintiff as successor administratix was to invoke federal jurisdiction. *This litigation could have proceeded without any difficulty with Rea as administratrix notwithstanding her pregnant condition which was of limited duration and the state of her health.*" (Emphasis added)

Thus, the trial court specifically rejected the only other reason offered by respondent for her appointment as successor administratrix, thereby leaving the artificial creation of diversity jurisdiction as the *sole* reason for respondent's appointment.

Finally, petitioners would note that the trial court's determinations constitute findings of fact that are binding unless found to be clearly erroneous, a situation not even remotely existing in the record of this case. See F.R.C.P. 52(a).

CONCLUSION

For the above and foregoing reasons, petitioners urge that this Petition for Certiorari should be granted.

Respectfully submitted,

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August, 1980

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed May 16, 1980]

DONNA BETH HACKNEY, Successor Administratrix of the Estate of Byrdie E. Blasdel, Deceased, Plaintiff-Appellant,	)	
v.	)	
	)	No. 78-1981
NEWMAN MEMORIAL HOSPITAL, INC., an Oklahoma Corporation, a/k/a Newman Memorial Hospital; NEWMAN MEDICAL CENTER, INC., a professional corporation; JOSEPH J. SMITH, M.D.; and JACK T. DANCER, M.D., Defendants-Appellees.	)	

Appeal from the United States District Court
For the Western District of Oklahoma
(D.C. No. Civ-77-0845-D)

Gomer Smith, Jr., of Smith, Smith & Vaughn (W. Rogers Abbott II and John C. McMurry of Abbott & McMurry with him on the briefs), Oklahoma City, Oklahoma, for Plaintiff-Appellant.

John Wiggins, Oklahoma City, Oklahoma, for Defendants-Appellees, Newman Medical Center, Inc., Joseph J. Smith, M.D., and Jack T. Dancer, M.D.

Glen D. Huff (James D. Foliart with him on the brief) of Foliart, Mills & Niemeyer, Oklahoma City, Oklahoma, for Defendant-Appellee, Newman Memorial Hospital, Inc.

Before SETH, Chief Judge, McKAY and LOGAN, Circuit Judges.

[APPENDIX]

LOGAN, Circuit Judge.

This is an appeal from an order dismissing a wrongful death action brought by Donna Beth Hackney as administratrix of her deceased mother's estate. The basis for the dismissal was the trial court's ruling that plaintiff was improperly or collusively appointed successor administratrix to create diversity jurisdiction, in violation of 28 U.S.C. § 1359. The propriety of this ruling is the only question in this appeal.

Byrdie Blasdel, a life-long resident of Oklahoma, died November 12, 1975. She was survived by her husband, a severely disabled person, also a resident of Oklahoma, and two daughters, Brenda Sue Rea and plaintiff. Rea was a citizen of Oklahoma; plaintiff was then a citizen of Colorado. The family decided Rea should administer the estate and she was duly appointed. She acted in this capacity until June 6, 1977, when she resigned and plaintiff was appointed successor administratrix. At that time the estate had been fully administered except for the conduct of the wrongful death action. This suit was commenced on August 29, 1977, while plaintiff and her husband were in Oklahoma on a house-hunting trip because of an anticipated transfer of plaintiff's husband by his employer. In September the transfer was finalized, and plaintiff and her husband moved to Woodward, Oklahoma, where they have resided since. All defendants are citizens of Oklahoma.

The trial court held an evidentiary hearing to determine whether plaintiff was a citizen of Oklahoma when the suit was filed and, in the alternative, whether she was improperly or collusively appointed to succeed her sister for the purpose of creating diversity jurisdiction. The trial court found that plaintiff was a citizen of Colorado when the suit was filed, but ordered dismissal on the ground

plaintiff was appointed in violation of the anti-collusion statute, 28 U.S.C. § 1359. Plaintiff appeals from this order.[1]

The trial court did not expressly discuss section 1359 in terms of its "improperly or collusively made" language.[2] Instead, it couched the holding in factual terms, referring to the case as "essentially a local controversy" and finding the appointment of plaintiff was for the "primary purpose of invoking federal jurisdiction." Plaintiff argues that the court's reliance upon a "primary" purpose test is erroneous. We do not decide that issue, since we hold the purpose of the appointment is not determinative in this case.

Prior to 1968 the courts construed section 1359 narrowly in determining whether an appointment of a nonresident fiduciary was improper or collusive. The leading case, Corabi v. Auto Racing, Inc., 264 F.2d 784 (3d Cir. 1959), held that such an appointment is not collusive unless there is collusion between plaintiff and defendant in fraud of the court, and is not improper if the state court appointment was valid. But in McSparran v. Weist, 402 F.2d 867 (3d Cir. 1968), *cert. denied,* 395 U.S. 903 (1969), *Corabi* was overruled, the court reasoning that the relevant collusion is between the "nonresident [fiduciary] and the applicant for his appointment in the state proceeding as a result of which one who would not otherwise have been named as [fiduciary] has achieved the status from which he claims the right to sue because of his artificial selection solely for the purpose of creating jurisdiction." *Id.* at 873. It also reasoned that a federal court's determination that a fiduciary's appointment violates section 1359 is not a col-

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[1] Defendants did not file a cross-appeal concerning the trial court's ruling that plaintiff was a Colorado citizen. We therefore do not entertain their arguments that the court's decision was error.

[2] 28 U.S.C. § 1359 provides that a district court "shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

lateral attack on the appointment by the state court. The appointee retains the capacity to act as representative; his or her citizenship is simply disregarded for federal purposes. *Id.* at 874. The court construed the words "improperly or collusively" to "say in effect that a nominal party designated simply for the purpose of creating diversity of citizenship, who has no real or substantial interest in the dispute or controversy, is improperly or collusively named." *Id.* at 873. Shortly thereafter in Kramer v. Caribbean Mills, Inc., 394 U.S. 823 (1969), the Supreme Court held that an assignment of an interest in a contract for purposes of collection only is improperly or collusively made under 28 U.S.C. § 1359 even though the assignment is valid under state law."

Drawing in part upon *Kramer,* other circuits have followed *McSparran. See, e.g.,* Bishop v. Hendricks, 495 F.2d 289 (4th Cir.), *cert. denied,* 419 U.S. 1056 (1974); Rogers v. Bates, 431 F.2d 16 (8th Cir. 1970); O'Brien v. AVCO Corp., 425 F.2d 1030 (2d Cir. 1969). *See generally,* 14 C. Wright, A. Miller & E. Cooper, Federal Prac. & Proc.: Jurisdiction § 3640 (1976). In several of these cases the parties admitted the sole reason for the out-of-state fiduciary was to achieve diversity jurisdiction, as was permitted under the *Corabi* rule. *E.g.,* O'Brien v. AVCO, Corp., *supra.* The courts following *McSparran,* however, have emphasized that the purpose for which the representative was appointed is but one of the factors the court should consider. *E.g.,* Bishop v. Hendricks, *supra;* Lester v. McFaddon, 415 F.2d 1101 (3d Cir. 1969). Although they found appointment of straw parties as fiduciaries solely to obtain diversity jurisdiction was collusive within section 1359, in dictum they declared or inferred that if the appointed representative has a substantial relationship to the litigation the result would be different. *See, e.g.,* Bishop v. Hendricks, 495 F.2d at 295. The instant case tests the dictum.

Some courts have held that an administrator whose sole function is to conduct a wrongful death action and collect the proceeds for the beneficiaries is only a nominal

party for purposes of section 1359. *E.g.*, O'Brien v. AVCO Corp., 425 F.2d 1030 (2d Cir. 1969); Lester v. McFaddon, 415 F.2d 1101 (4th Cir. 1969). Under Oklahoma law the administrator, if there is one, must bring the wrongful death action and distribute any proceeds recovered directly to the statutory beneficiaries. Okla. Stat. Ann. tit. 12, § 1053 (West 1961) (amended 1978). The administrator, in whom the cause of action inheres, has full authority to conduct the litigation; the beneficiaries have no right to settle, control or otherwise dispose of the action. National Valve & Mfg. Co. v. Wright, 240 P.2d 766 (Okla. 1951). Also, plaintiff here is a beneficiary entitled to a portion of any proceeds recovered in the suit. *See id.* at 1106; *see also* O'Brien v. Stover, 443 F.2d 1013 (8th Cir. 1971). Because plaintiff has a real, substantive stake in the litigation she is not a straw party. Had plaintiff been appointed as the original administratrix, defendants admit they would have had problems in challenging the appointment. We think the result should be the same, even if she was appointed as successor simply to obtain diversity jurisdiction.

There was a vacancy in the office of administratrix of the estate; plaintiff is a statutorily preferred replacement, Okla. Stat. Ann. tit. 58, § 122 (West 1965), and was the only one capable of serving after Rea's resignation. Allowing plaintiff to be appointed and pursue this action in federal court does not provide opportunities for abuse of federal jurisdiction in any degree comparable to appointment of a nonresident straw party. A rule permitting challenge of the appointment as fiduciary of a nonresident family member who has a beneficial interest in the recovery would provide an opportunity for delay tactics by defendants and force trial courts to hold hearings upon subjective motivations that would be time consuming and extremely difficult to resolve. We think the better view is to make immune from challenge, for diversity purposes, an appointment of a fiduciary who has a substantial beneficial interest in the litigation being conducted.

Reversed and remanded for further proceedings consistent herewith.

SETH, Chief Judge, concurring:

I concur with the conclusion that it has not been shown that plaintiff is a straw party, but would like to emphasize other aspects of the case.

The trial court concluded "that the primary or dominant purpose of the appointment of Plaintiff as successor administratrix was to invoke federal jurisdiction." However, such a "primary purpose" can exist without bringing this case within the prohibitions of 28 U.S.C. § 1359. There can have been such a purpose, but nevertheless the representative has not been shown to have been collusively or improperly made a party as the statute contemplates. A motive or intent to secure federal jurisdiction does not of itself defeat jurisdiction.

The conclusion by the trial court that the federal jurisdiction purpose was "primary," necessarily also concludes that there were other and different reasons, whether advanced by plaintiff or not, for the appointment, hence a determination that the quest for federal jurisdiction was not the sole reason. *See* Bishop v. Hendricks, 495 F.2d 289 (4th Cir.); McSparran v. Weist, 402 F.2d 867 (3d Cir.); and Gilchrist v. Strong, 299 F. Supp. 804 (W.D. Okla.)

This primary purpose test applied by the trial court thus does not as a matter of law apply the statutory standard. It invokes the sanctions of 28 U.S.C. § 1359 on a showing not therein contemplated.

The Supreme Court in Kramer v. Carribbean Mills, Inc., 394 U.S. 823, considered an assignment to a collection agent, and concluded that the assignment was "improperly or collusively made" under 28 U.S.C. § 1359. The Court said it would not re-examine cases wherein the assignment

was "absolute" regardless of the transferor's motive; nor would it consider whether in cases brought by an administrator or guardian "a motive to create diversity jurisdiction renders the appointment of an out-of-state representative 'improper' or 'collusive'." The Court stated several reasons why administrator cases might be different from assignment cases. One of these differences describes the state action in appointments with the inference that an examination under the collusive and improper standard might interfere with state probate administration.

We recognize the differences between assignment cases and those involving representatives in probate proceedings and the implications therein. However, we agree with other circuits that the citizenship alone of the representative cannot be determinative under 28 U.S.C. § 1359 when it is challenged as in the case before us, and that *Kramer* does not prevent an examination of other factors. Lester v. McFaddon, 415 F.2d 1101 (4th Cir.); McSparran v. Weist, 402 F.2d 867 (3rd Cir.).

Thus we hold that a limited examination and evaluation of the facts surrounding the appointment of plaintiff and of the duties she is to perform are proper but not to include whether she is experienced, capable, or somehow competent, as we do not endorse the general examination into *qualifications* as described in Groh v. Brooks, 421 F.2d 589 (3d Cir.). This is for the reason that if it be determined that those standards are not met, the conclusion must be that the representative is not competent, and the problems contemplated in *Kramer* thus arise. This goes beyond the bare jurisdictional view of the representative.

The usual measure under the collusive and improper standard applies to the plaintiff as a representative as it does in cases concerned with other matters. There are indications in some reported cases that other standards apply to administrators, but we see no basis for a different treatment.

This court in Bradbury v. Dennis, 310 F.2d 73 (10th Cir.), considered the meaning of "collusive" and "improperly" in an assignment case, and discusses the authorities. *See also* the same case at 368 F.2d 905.

The existence of a motive or interest to create diversity is not necessarily fatal as we mentioned at the outset. The teachings of Black and White Taxi Co. v. Brown and Yellow Taxi Co., 276 U.S. 518, must be considered. Motive and intent are obviously elements in the collusive and improper determination, but are not controlling factors under *Black and White.*

The court in McSparran v. Weist, 402 F.2d 867 (3d Cir.), decided that "collusively" can include improper agreements among the several persons on only one side of the litigation. We do not decide that question as the collusion issue has not yet been reached. *See also* Cashman v. Amador & Sacramento Canal Co., 118 U.S. 58, and Schilling v. Belcher, 582 F.2d 995 (5th Cir.), and the references therein to "party plaintiff 'collusively made'."

Thus the test applied by the trial court does not meet the requirements of the statute, and the case must be and is reversed and remanded to the trial court for further proceedings.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Filed Oct. 4, 1978]

DONNA BETH HACKNEY, Successor Administratrix of the Estate of BYRDIE E. BLASDEL, Deceased, Plaintiff,	)	
v.	)	No. CIV-77-0845-D
NEWMAN MEMORIAL HOSPITAL, INC., an Oklahoma corporation, a/k/a NEWMAN MEMORIAL HOSPITAL; NEWMAN MEDICAL CENTER, INC., a professional corporation; JOSEPH J. SMITH, M.D.; and JACK T. DANCER, M.D., Defendants.	)	

ORDER

This is a wrongful death action brought by Plaintiff as the successor administratrix of the estate of her mother, Byrdie S. Blasdel, deceased. It is asserted that the Court has subject matter jurisdiction of this action by reason of diversity of citizenship and amount in controversy pursuant to 28 U.S.C. § 1332.

Pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure, Defendants Newman Medical Center, Inc., Joseph J. Smith, M.D., and Jack T. Dancer, M.D., have filed herein a joint Motion to Dismiss this action for lack of subject matter jurisdiction. Defendant Newman Memorial Hospital, Inc. has also filed a Motion to Dismiss for lack of subject matter jurisdiction. Said Motions are supported by Briefs and Plaintiff has filed a single Brief in opposition to Defendants' Motions. On August 10, 1978, an evidentiary hearing was held in connection with Defendants' Motions.

In support of their respective Motions, all of the Defendants contend that the Court lacks subject matter jurisdiction of this action under 28 U.S.C. § 1332 as Plaintiff was an Oklahoma citizen at the time this action was filed and all Defendants are Oklahoma citizens. In addition, Defendant Newman Memorial Hospital, Inc. contends that Plaintiff's appointment as successor administratrix of her mother's estate was improperly and collusively made to invoke the jurisdiction of the Court in violation of 28 U.S.C. § 1359.[1] In her Brief in opposition to Defendant's Motions, Plaintiff argues that diversity jurisdiction exists as Plaintiff was a citizen of a State other than Oklahoma when this action was commenced and was not improperly or collusively appointed as successor administratrix in this case.

At the evidentiary hearing on Defendants' Motions, a total of four witnesses testified and three exhibits were admitted into evidence. Admission of a fourth exhibit, Plaintiff's Exhibit 1, was objected to by Defendants primarily on the ground that said exhibit constituted inadmissible hearsay as this exhibit is an affidavit of Charles E. Lea, M.D., concerning his treatment of and advice to Plaintiff's sister, Brenda S. Rea (Rea), who was the original administratrix of her mother's estate, and Dr. Lea was not present to testify at the hearing. The Court reserved ruling on the admissibility of Plaintiff's Exhibit 1.

Rule 12(d), Federal Rules of Civil Procedure, contemplates a preliminary hearing and determination of jurisdictional issues in advance of trial unless the court defers such action until the time of trial. *Schramm* v. *Oakes*, 352 F.2d 143 (Tenth Cir. 1965). As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its

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[1] 28 U.S.C. § 1359 provides as follows:

> "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

determination is left to the trial court. *Gibbs* v. *Buck*, 307 U.S. 66, 59 S.Ct. 725, 83 L.Ed. 1111 (1939); *Sherman* v. *American Federation of Musicians*, ____ F.2d ____ (Tenth Cir. 1978); *Schramm* v. *Oakes, supra; Walden* v. *Elrod*, 72 F.R.D. 5 (W.D. Okla. 1974). The trial court may gather evidence on the question of jurisdiction by affidavits or otherwise to determine the facts as they exist and based upon the evidence so obtained, decide the jurisdictional dispute. *KVOS, Inc.* v. *Associated Press*, 299 U.S. 269, 57 S.Ct. 197, 81 L.Ed. 183 (1936); *Schramm* v. *Oakes, supra; Walden* v. *Elrod, supra*. As Dr. Lea's affidavit appears relevant to the jurisdictional issue before the Court, the Court finds and concludes that said affidavit should be admitted into evidence and it is so ordered.

Diversity jurisdiction in federal courts is determined from the allegations of the Complaint. *Whitelock* v. *Leatherman*, 460 F.2d 507 (Tenth Cir. 1972); *Alfonso* v. *Hillsborough County Aviation Authority*, 308 F.2d 724 (Fifth Cir. 1962); *Wilson* v. *Pickens*, 444 F.Supp. 53 (W.D. Okla. 1977); *Walden* v. *Elrod, supra*. If a plaintiff's allegation of jurisdictional facts is challenged by a defendant then the plaintiff has the burden of supporting the allegations with competent proof. *Thomson* v. *Gaskill*, 315 U.S. 442, 62 S.Ct. 673, 86 L.Ed. 951 (1942); *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135 (1936); *Wilson* v. *Pickens, supra; Walden* v. *Elrod, supra*. The burden of proof in such a situation is by a preponderance of the evidence. *Mid-Continent Pipe Line Co.* v. *Whitely*, 116 F.2d 871 (Tenth Cir. 1941); *Wilson* v. *Pickens, supra; Walden* v. *Elrod, supra*.

Diversity of citizenship is determined as of the time the suit is instituted. *Johnston* v. *Cordell National Bank*, 421 F.2d 1310 (Tenth Cir. 1970); *Wison* v. *Pickens, supra; Walden* v. *Elrod, supra*. However, a diversity action should be dismissed if at any time it becomes apparent that there is a lack of diversity. *Bradbury* v. *Dennis*, 310 F.2d 73 (Tenth Cir. 1962), *cert. denied*, 372 U.S. 928, 83 S.Ct. 874,

9 L.Ed.2d 733 (1964); *Wilson* v. *Pickens, supra; Walden* v. *Elrod, supra.* With respect to the diversity jurisdiction of federal courts, "citizenship" has the same meaning as "domicile" and imports permanent residence in a particular state. *Walden* v. *Broce Construction Co.*, 357 F.2d 242 (Tenth Cir. 1966); *Wilson* v. *Pickens, supra.* The two elements essential to the establishment of a new domicile are intent and some act to carry such intention into effect. *Johnston* v. *Cordell National Bank, supra; Wilson* v. *Pickens, supra; Walden* v. *Elrod, supra.* Residence alone is not the equivalent of citizenship, although the place of residence is prima facie domicile, and citizenship is not necessarily lost by protracted absence from home, where the intention to return remains. *Walden* v. *Broce Construction Co., supra; Wilson* v. *Pickens, supra.* Nor is mere mental fixing of citizenship sufficient to establish citizenship for purposes of federal diversity jurisdiction. *Id.*

The record before the Court in the instant case reveals that Plaintiff's husband was advised by his employer during the middle of August of 1977 that he might be transferred from Colorado to Oklahoma. Thereafter, Plaintiff and her husband came to Oklahoma to look for housing, signed a contract (Plaintiff's Exhibit 2) on August 26, 1977, for the purchase of a home in Woodward, Oklahoma, and returned to Colorado. The Complaint in this case was filed on August 29, 1977. Plaintiff's husband's transfer to Oklahoma became definite on September 7, 1977, whereupon Plaintiff and her husband listed their Colorado home for sale and moved to Woodward, Oklahoma, where they have resided since September 9, 1977.

In view of the foregoing, the Court finds and concludes that the preponderance of the evidence before it indicates that Plaintiff had not changed her domicile to Oklahoma prior to filing this action. Change of residence and intent to remain permanently or at least indefinitely are the criteria which this Court must consider in determining whether a change of domicile has resulted in a change of

citizenship for the purposes of conferring diversity jurisdiction. *Walden* v. *Broce Construction Co., supra; Wilson* v. *Pickens, supra; Walden* v. *Elrod, supra.* As Plaintiff did not change her residence from Colorado to Oklahoma until after her husband's transfer was definite and after the Complaint in this action had been filed, the diversity of citizenship between Plaintiff and Defendants required in order for the Court to have jurisdiction under 28 U.S.C. § 1332 existed at the time this suit was instituted.

At the evidentiary hearing herein, Rea testified that she was appointed administratrix of her mother's estate in November of 1975 and served in this capacity until June of 1977 when she resigned due to pregnancy and the advice of her doctor. *See* Plaintiff's Exhibit 1. Plaintiff was appointed successor administratrix shortly thereafter. *See* Plaintiff's Exhibit 4. Rea further testified that she resigned as administratrix solely because of her health. Likewise, Plaintiff testified that she took the position of successor administratrix because of her sister's health. However, the evidence indicates that the majority of the duties of administration were carried out by Rea while she was administratrix and that the only thing Plaintiff has done in connection with her mother's estate is prosecute this lawsuit. Furthermore, the totality of the circumstances surrounding Rea's resignation and Plaintiff's appointment establish that the primary or dominant purpose of the appointment of Plaintiff as successor administratrix was to invoke federal jurisdiction. This litigation could have proceeded without any difficulty with Rea as administratrix notwithstanding her pregnant condition which was of limited duration and the state of her health. The evidence revealed discussions between the parties and attorneys regarding the successor Colorado administratrix as a means of filing the case in federal court. The attorneys in this case rather than the probate attorneys arranged for the resignation of Rea and the appointment of Plaintiff.

Therefore, as this case is essentially a local controversy between Oklahoma citizens and there is no possibility of discrimination against an out of state party as Plaintiff is now an Oklahoma resident and as Plaintiff was appointed successor administratrix for the primary purpose of invoking federal jurisdiction, the Court finds and concludes pursuant to 28 U.S.C. § 1359 that it lacks subject matter jurisdiction of this action. *Gilchrist* v. *Strong*, 299 F.Supp. 804 (W.D. Okla. 1969); *see McSparran* v. *Weist*, 402 F.2d 867 (Third Cir. 1968), *cert. denied*, 395 U.S. 903, 89 S.Ct. 1739, 23 L.Ed.2d 217 (1969); *Ferrara* v. *Philadelphia Laboratories, Inc.*, 272 F.Supp. 1000 (D. Vt. 1967), *aff'd on opinion below*, 393 F.2d 934 (Second Cir. 1968); *see also Hudgens* v. *Cook Industries, Inc.*, 310 F.Supp. 32 (N.D. Okla. 1970). Accordingly, Defendants' Motions to Dismiss should be granted and Plaintiff's action dismissed without prejudice.

IT IS SO ORDERED this 4th day of October, 1978.

(s) *Fred Daugherty*

Fred Daugherty
United States District Judge

JUDGMENT ENTERED IN CIVIL DOCKET ON OCT 4 1978

Supreme Court, U. S.
FILED
OCT 14 1980
MICHAEL RODAK, JR., CLERK

No. 80-236

In the Supreme Court of the United States

OCTOBER TERM, 1980

NEWMAN MEMORIAL HOSPITAL, INC., NEWMAN MEDICAL CENTER, INC., JOSEPH J. SMITH, M.D., and JACK T. DANCER, M.D.,
Petitioners,

VERSUS

DONNA BETH HACKNEY, Successor Administratrix of the Estate of Byrdie E. Blasdel, Deceased,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether this Court should grant certiorari to review a question which has been efficiently and effectively answered by the courts of appeal of the various circuits whose opinions are consistent and in harmony with each other.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW	i
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
CONCLUSION	7

CERTIFICATE OF SERVICE follows Brief.

TABLE OF AUTHORITIES

Cases PAGE

Corabi v. Auto Racing, Inc., 264 F.2d 784 (3rd Cir. 1959) 6

Ferrara v. Philadelphia Laboratories, Inc., 272 F.Supp. 1000 (D. Vt. 1967), aff'd on opinion below, 393 F.2d 934 (2d Cir. 1968) 4

Groh v. Brooks, 421 F.2d 589 (3rd Cir. 1979) 4

Hackney v. Newman Memorial Hospital, Inc., 621 F.2d 1069 (10th Cir. 1980) 1, 3, 4

Joyce v. Seigel, 429 F.2d 128 (3rd Cir. 1970) 5

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 2

McSparran v. Weist, 402 F.2d 867 (3rd Cir. 1968), cert. den. 395 U.S. 903 (1969) 2, 4

O'Brien v. Stover, 443 F.2d 1013 (8th Cir. 1971) 5

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955) 2

Statutes

28 U.S.C. § 1332 5
28 U.S.C. § 1359 ..... 2, 5, 6, 7

Miscellaneous

Rule 19, Rules of the U. S. Supreme Court 2

ALI Study of the Division of Jurisdiction Between State and Federal Courts (Tent. Draft No. 1, 1963) at 122-23 6

ALI Study of Division of Jurisdiction Between Federal and State Courts (Official Draft, 1969) § 130 (b)(4) at 117-19 6

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent disagrees with the Petitioners' interpretation of facts stated in their "Statement of Case". However, Respondent does not take issue with Petitioners' specific statements because the bulk of them are not relevant to the question of whether certiorari should be granted. That determination can be made from the opinion below, *Hackney* v. *Newman Memorial Hospital, Inc.*, 621 F.2d 1069 (10th Cir. 1980).

REASONS FOR DENYING THE WRIT

This Court has stated that review by certiorari should be limited to,

> ". . . [C]ases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Rice* v. *Sioux City Memorial Park Cemetery, Inc.* 349 U.S. 70, 79 (1955), citing *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387 (1923).

Although considerations governing review on certiorari are described in Rule 19, Rules of the Supreme Court of the United States, the quoted standard isolates the factors which are particularly applicable here. The quoted standard is not met in the instant action. Certiorari should be denied.

Although a consistent interpretation of 28 U.S.C. § 1359 is a matter of importance to the public, that need for interpretation is being efficiently and effectively met by the circuit courts of appeal. Far from there being "a real and embarrassing conflict of opinion and authority" among circuit courts, there has been basic harmony in interpreting 28 U.S.C. § 1359 since the Third Circuit decided *McSparran* v. *Weist*, 402 F.2d 867 (3rd Cir. 1968), *cert. denied*, 395 U.S. 903 (1969).

This is not to say that in applying 28 U.S.C. § 1359 the courts of appeal of the various circuits always sustain jurisdiction or always find it lacking. Obviously, the results they reach depend on the facts of the cases they

review. However, the rationale used in arriving at those determinations is consistent, and the decisions are basically compatible and in accord with each other.

It is apparent from the language of the Tenth Circuit's opinion which Petitioners seek to have reviewed that it drew upon interpolation of this Court's pronouncements and the experience of other circuits in reaching its decision:

> "Drawing in part upon *Kramer* [v. *Carribean Mills, Inc.*, 394 U.S. 823 (1969)], other circuits have followed *McSparran*. *See, e.g., Bishop* v. *Hendricks,* 495 F.2d 289 (4th Cir. 1974), *cert. denied,* 419 U.S. 1056 (1974); *Rogers* v. *Bates,* 431 F.2d 16 (8th Cir. 1970); *O'Brien* v. *AVCO Corp.,* 425 F.2d 1030 (2d Cir. 1969). *See generally,* 14 C. Wright, A. Miller & E. Cooper, *Federal Prac. & Proc.:* Jurisdiction § 3640 (1976). In several of these cases the parties admitted the sole reason for the out-of-state fiduciary was to achieve diversity jurisdiction, as was permitted under the *Corabi* rule. *E.g., O'Brien* v. *AVCO Corp., supra.* The courts following *McSparran,* however, have emphasized that the purpose for which the representative was appointed is but one of the factors the court should consider. *E.g., Bishop* v. *Henricks, supra; Lester* v. *McFaddon,* 415 F.2d 1101 (3rd Cir. 1969). Although they found appointment of straw parties as fiduciaries solely to obtain diversity jurisdiction was collusive within section 1359, in dictum they declared or inferred that if the appointed representative has a substantial relationship to the litigation the result would be different. *See, e.g., Bishop* v. *Hendricks,* 495 F.2d at 295. The instant case tests the dictum." 621 F.2d at 1070-71.

The concurring opinion in the instant action indicates a failure to endorse one of the tests used by the Third Circuit—inquiry into qualifications of the non-resident fi-

duciary per *Groh* v. *Brooks*, 421 F.2d 589 (3rd Cir. 1979). However, no conflict with the Third, or any other Circuit, is manifested by the Tenth Circuit's opinion here recognizing the citizenship for diversity purposes of a non-resident fiduciary who has a real, substantive stake in the litigation and is not a mere straw party. As the court below observed:

> "Under Oklahoma law the administrator, if there is one, must bring the wrongful death action and distribute any proceeds recovered directly to the statutory beneficiaries. [Cite omitted.] The administrator, in whom the cause of action inheres, has full authority to conduct the litigation; the beneficiaries have no right to settle, control or otherwise dispose of the action. [Cite omitted.] Also, plaintiff here is a beneficiary entitled to a portion of any proceeds recovered in the suit. [Cite omitted.] Because plaintiff has a real, substantive stake in the litigation she is not a straw party. . . .
>
> * * * *
>
> "There was a vacancy in the office of administratrix of the estate; plaintiff is a statutorily preferred replacement. [Cite omitted.] . . ." 621 F.2d, at 1071.

Petitioners have attempted to induce a perception of conflict among the circuits by isolating language from various opinions. The extent of their effort is underscored by comparison of the leading non-resident fiduciary case, *McSparran* v. *Weist, supra,* and its progeny with an assignment case, *Ferrara* v. *Philadelphia Laboratories, Inc.*, 272 F.Supp. 1000 (D. Vt. 1967), *aff'd* on opinion below, 393 F.2d 934 (2d Cir. 1968). Even in that situation the holdings are consistent. The cases are varied as the facts, but the basic rationale is the same. Where the sole purpose as judged

by objective factors is the creation of diversity of citizenship to invoke federal jurisdiction, there is collusion within the meaning of 28 U.S.C. § 1359 because a fiduciary is appointed as a representative in state court proceedings in the absence of factors which the state court would normally consider. On the other hand, where there is a valid purpose for appointment and consanguinity between decedent and representative, there is no impropriety or collusion within the meaning of 28 U.S.C. § 1359. *Joyce* v. *Seigel,* 429 F.2d 128 (3rd Cir. 1970), *O'Brien* v. *Stover,* 443 F.2d 1013 (8th Cir. 1971). Here factors which the state court would normally consider—consanguinity, a statutory preference and entitlement to a portion of any proceeds recovered in the suit—were present. Hence, impropriety or collusion was absent. The opinion below is in accord with other courts of appeal. There is no "embarrassing conflict of opinion and authority" among the circuits. Cases vary as do the facts, but courts uniformly focus on objective factors, such as the real, substantive stake in the outcome by the representative, to determine if the representative is or is not a straw party appointed for the sole purpose of creating federal jurisdiction.

In their zeal to obtain review by this Court, Petitioners have confused debate concerning abolition of diversity jurisdiction with interpretations of 28 U.S.C. § 1359. Diversity jurisdiction is a creature of statute (28 U.S.C. § 1332) and its abolition is not a matter appropriately raised by the instant action. Petitioners cite a statement by the American Law Institute condemning deliberate creation of diversity jurisdiction. The context of the statement is the A.L.I. position urging *legislation* to provide imputation of

the decedent's citizenship to his representative. *ALI Study of Division of Jurisdiction Between Federal and State Courts* (Official Draft, 1969) § 1301(b)(4) at 117-19. That was at a time when the restrictive interpretation placed on 28 U.S.C. § 1359 by *Corabi* v. *Auto Racing, Inc.*, 264 F.2d 784 (3rd Cir. 1959), allowed widespread creation of diversity jurisdiction in cases involving representative plaintiffs whenever the law of the state of appointment allowed non-residents to serve. Between *Corabi* in 1959 and *McSparran* v. *Weist* in 1968, the American Law Institute found that 20.5 percent of diversity cases in the Eastern District of Pennsylvania involved appointment of non-resident representatives. *ALI Study of the Division of Jurisdiction Between State and Federal Courts* 122-23 (Tent. Draft No. 1, 1963). The courts of appeal of the various circuits, led by the Third Circuit in *McSparran* v. *Weist*, have effectively and efficiently met this problem by disregarding the citizenship of a straw party for purposes of determining diversity.

The pros and cons of Congressional revision of 28 U.S.C. § 1359 are not a matter appropriately raised by the instant action. The "considerable urgency" of manufactured jurisdiction cited by Petitioners, was a problem twelve years ago. It has been efficiently and effectively dealt with by the courts of appeal of the various circuits which decide questions on a case by case basis with consistent interpretations of 28 U.S.C. § 1359.

CONCLUSION

This Court should not be burdened with review of the instant action. Precedent commands that review by certiorari be limited to matters of public importance and "real and embarrassing conflicts" among the circuit courts of appeal. Interpretation of 28 U.S.C. § 1359 is consistent among the circuit courts which have efficiently met questions of public import which concern this statute.

Respectfully submitted,

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October, 1980

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the instrument to which this certification is attached, were served, by placing same in the U. S. Mail, with postage fully prepaid thereon, to the following:

James D. Foliart and
Glenn D. Huff
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John Wiggins
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Oklahoma City, Oklahoma 73102

by the undersigned, a member of the Bar of this Court, this _____ day of October, 1980.

All parties required to be served have been served.

Gomer Smith, Jr.